III. HH&C'S ATTACKS ON PETITIONERS' INTEGRITY ARE FALSE AND UNFOUNDED.

Finally, HH&C has made a number of misstatements about matters that have no bearing on the issues presented here, in an apparent effort to damage petitioners' credibility. That effort is doubly ironic in light of the fact that it was HH&C's own refusal to respect the clear forum selection clause in its contract with Capital Suisse that led to its prosecution of the underlying Utah state-court action.[5]

1. HH&C accuses petitioners of incorrectly stating that Capital Suisse offered HH&C "valuable stock in a related company," when in fact the stock lacked value. Resp. Opp. at 4. But the referenced company, Petsmarketing, did have value. If this issue had any bearing on the questions presented (which it does not), this Court could take judicial notice that its stock was trading at $9.25/share in June, 2001.[6] *See* www.pinksheets.com (subscription service that provides historical quotes) (relevant stock quotes attached as App. 111a-112a). The district court's contrary finding reflects only the unfortunate consequences of Capital Suisse's decision "not to participate in the district court litigation in a manner that might constitute a waiver of its right to contest the court's orders" on either jurisdictional or venue grounds. Pet. at 7.

2. HH&C also contends that Capital Suisse moved records to Spain "to evade production" and further takes issue with Capital Suisse's representation that it did so with "full

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[5] As explained in the petition, HH&C plainly agreed "that any legal action the Funds may be the object of, be brought before the court of the British Virgin Islands, and ***we renounce to take any possible legal proceedings against the Funds under other jurisdictions***." (App. 19a-21a) (emphasis added).

[6] *See La Grasta v. First Union Sec.*, 358 F.3d 840, 842 (11th Cir. 2004) (stock quotes properly the subject of judicial notice); *see also Greenhouse v. MCG Capital Corp.*, 392 F.3d 650, 655 n. 4 (4th Cir. 2004); *Ieradi v. Mylan Lab. Inc.*, 230 F.3d 594, 600 n. 3 (3d Cir. 2000).

disclosure to the court and plaintiffs." Resp. Opp. at 5. Again, HH&C's assertions have no bearing on the questions presented and are, in any event, inaccurate.

The production issue surfaced after HH&C declined to travel to Spain to review relevant documents. At that time, Capital Suisse informed the court that a large number of responsive documents "have always been located in Spain" and that other relevant documents were transferred to Spain because "the Capital Suisse Defendants have been forced to consolidate a substantial portion of their operations." App. 116a-117a. Capital Suisse subsequently informed all concerned that, as a result of a court order freezing its assets, it had suffered financial difficulties and had closed its Utah offices. *Id.* at 32a. Although the Utah district court subsequently made the adverse finding quoted in the petition (at 8, quoting Pet. App. 48a), it did so, again, without the benefit of a substantive response from Capital Suisse, which by that time had withdrawn from the litigation at the trial court level.[7]

In all events, the questions presented in the petition plainly assume (without conceding) the correctness of the factual findings made by the courts below. Thus, any dispute over those findings is irrelevant to this Court's decision whether to grant the petition and resolve the important issues presented here.

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[7] That the document production orders are at issue at all is surprising because, according to HH&C's filings in the Spanish Court, it already knows where "its" money went and thus desires no further discovery. *See* Resp. App. 23b-24b.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that their petition for a writ of certiorari be granted.

Respectfully submitted,

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June 14, 2005

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APPENDICES

APPENDIX N

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

Consolidated Case No. 010905355
Judge Anthony Quinn

HENTSCH HENCHOZ & CIE,

Plaintiff,

vs.

PHILIPPE D. DAVID GUBBAY, CAPITAL SUISSE, S.A., CAPITAL SUISSE SECURITIES, INC., ZOOLEY SERVICES LIMITED, ZOOLEY OF UTAH, INC., FERNLAND LIMITED, DOUGLAS P. HOYT, and JOHN DOES 1-10,

Defendants.

In the Matter of:

The Criminal Proceeding of the Kingdom of Spain and Hentsch Henchoz & Cie against:

Philip David Gubbay

Court of First Instance and Instruction No. 2 Marbella
Court No. 1346/2000

contempt would be to pay the judgments, and the Court order requiring him to be deposed in connection with appellee's efforts to collect on the judgments, the Court of Appeals could "elect" to dismiss the appeal until appellant submitted proof that he has satisfied the judgments. *Id.*, 993 P.2d at 251. Similarly, Capital Suisse's inability to post a bond to remedy its contempt would justify dismissal of the appeal, not waiver of the bond. In effect, the Utah Supreme Court has made that "election" in its August 6th Opinion.[7]

For these reasons, this Court should determine that Capital Suisse has not posted a bond as required by the Supreme Court's August 6 Opinion.

III. The Outstanding Judgment Amount, Jointly and Severally, Against the Capital Suisse Defendants is $27,868,098.63 Plus Post Judgment Interest.

The Utah Supreme Court also requested that this Court identify "the amount of the unsatisfied portion of the district court judgment." Opinion, ¶ 25. The Capital Suisse Defendants have made no effort nor made any payment to reduce the amount of the judgment. Therefore, this Court should

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[7] The Capital Suisse Defendant's attempt to equate its unwillingness or inability to post a bond to a "death penalty" is wholly inappropriate and without merit. The Supreme Court specifically addressed due process concerns in its Opinion. See Opinion, ¶ 23. Indeed, the death penalty for Capital Suisse is that it committed fraud when it stole, hid and laundered HH&C's $25 million and by continuing the fraud by refusing to provide any reasonable explanation to the money's whereabouts.

determine that the unsatisfied portion of the judgment remains $27,868,098 plus post judgment interest.

CONCLUSION

For all of the foregoing reasons, this Court should deny the Capital Suisse Defendants' Expedited Motion Seeking Declaration Regarding Outstanding Orders and Satisfaction of Bond. Furthermore, this Court should enter an Order pursuant to the express instructions of the Utah Supreme Court indicating that (1) the Capital Suisse Defendants have not adequately complied with Judge Nehring's orders of this Court within thirty days from the Utah Supreme Court's Opinion; (2) that the Capital Suisse Defendants have failed to post bond in the amount of the unsatisfied portion of this Court's judgment; and (3) that the amount of the unsatisfied portion of this Court's judgment is $27,868,098.63 plus post judgment interest, jointly and severally against each of the Capital Suisse Defendants.

A proposed Order is filed contemporaneously herewith for the Court's consideration.

DATED this 20th day of September 2004.

CLYDE SNOW SESSIONS & SWENSON

/s/ Neil A. Kaplan
NEIL A. KAPLAN
PERRIN R. LOVE
WALTER A. ROMNEY, JR.

Attorneys for Plaintiff Hentsch Henchoz & Cie

APPENDIX O

JUNE 10, 2005

A REPORT

TRADING INFORMATION AS REPORTED BY THE NATIONAL ASSOCIATION OF SECURITIES DEALERS COMPOSITE FEED OR OTHER QUALIFIED INTER-DEALER QUOTATION MEDIUM. THE PRIMARY STOCK MARKET LISTING IS NOTED.

ISSUE: PETSMARKETING, INC. (DELA.) COMMON

NON-NASDAQ OTC:

2001	CLOSING BID	CLOSING ASK
JUNE 5	8.50	9.25
JUNE 6	8.50	9.25
JUNE 7	8.50	9.25

2001	HIGH SALE	LOW SALE	CLOSING SALE
JUNE 5	9.25	9.25	9.25
JUNE 6	(No Sales)		
JUNE 7	9.25	8.50	9.25

NOTE: THE INFORMATION IS COMPILED WITH CARE FROM SOURCES BELIEVED TO BE RELIABLE BUT WE CANNOT GUARANTEE THE ACCURACY NOR WARRANTEE ITS USE FOR ANY PURPOSE.

NOTE: PRICES HAVE NOT BEEN ADJUSTED FOR STOCK DIVIDENDS OR SPLITS.

NOTE: THE ABOVE BID AND ASK QUOTATIONS REPRESENT PRICES BETWEEN DEALERS AND DO NOT INCLUDE RETAIL MARKUP, MARKDOWN OR COMMISSION. THEY DO NOT REPRESENT ACTUAL TRANSACTIONS.

PINK SHEETS LLC

/s/ Evelyn Walsh
EVELYN WALSH

RESEARCH LIBRARY DEPARTMENT

EW/jl

APPENDIX P

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Attorneys for Defendants Capital Suisse, S.A., Zooley Services Limited, Phillipe D. Gubbay, Capital Suisse, Inc., Zooley of Utah and Fernland, Inc.

IN THE THIRD JUDICIAL DISTRICT COURT OF
SALT LAKE COUNTY
STATE OF UTAH

Civil No. 010905355
Judge Ronald E. Nehring

HENTSCH HENCHOZ & CIE,

Plaintiff,

vs.

PHILLIPE D. DAVID GUBBAY, CAPITAL SUISSE, S.A., CAPITAL SUISSE SECURITIES, INC., CAPITAL SUISSE, INC., ZOOLEY SERVICES LIMITED, ZOOLEY OF UTAH, INC., FERNLAND LIMITED, DOUGLAS P. HOYT, and JOHN DOES 1-10,

Defendants.

OPPOSITION TO REQUEST TO VACATE THE PROTECTIVE ORDER AND MOTION TO SHORTEN TIME WITHIN WHICH CAPITAL SUISSE DEFENDANTS MUST PROVIDE DISCOVERY

Defendants Phillipe D. David Gubbay, Capital Suisse, S.A., Captial Suisse, Inc., Zooley Services Limited, Zooley of Utah, Inc., and Fernland Limited (collectively, the "Capital Suisse Defendants") hereby file this Opposition to Motion to Shorten Time Within Which The Capital Suisse Defendants Must Provide Discovery and Vacate the Protective Order Regarding Bank Documents.

ARGUMENT

I. *The Bank's Request for Further Erosion of the Protective Order Is Improper and Is Not Intended to Further the Proceedings in This Or Any Other Case.*

As discussed below, the Court should deny Plaintiff Hentsch Henchoz & Cie's ("HH&C") request to further erode the protective order. Not only has HH&C failed to provide any legal or other basis for its request, but also the request is not designed to advance these or any other proceedings.

On February 8, 2002, this Court modified the protective order in this case to allow HH&C to use documents obtained in this proceeding in the proceedings currently pending in Spain and the British Virgin Islands (the "BVI"). HH&C claimed the other courts were being misled and it needed to immediately notify them about the documents. Despite the passage of five weeks since the Court's order, HH&C has yet to file any pleadings in either the Spanish or British Virgin Islands proceedings concerning the documents. The bank's claim of an immediate and pressing need to provide these documents to other Courts was, therefore, less than sincere.

Moreover, HH&C's claim that the other courts do not have the full information about HH&C's allegations is simply

untrue. The reality is that the foreign courts have all of HH&C's allegations of fraud before them. Indeed, HH&C fails to disclose to this Court that its attorneys filed a nine-page affidavit in the British Virgin Island court specifically outlining all of the bank's allegations as well as the reasoning of this Court's decision to retain jurisdiction of the matter in connection with its Motion to Dismiss the proceedings in the BVI. A copy of Mr. Neil Kaplan's affidavit dated December 10, 2001, is attached hereto. Thus, contrary to the bank's assertions, neither the BVI court nor the Spanish court has been misled.[1] Instead, HH&C is merely attempting to create a perception that the foreign courts are being misled in order to obtain favorable rulings in this proceeding.

Consistent with HH&C's plan, it now requests that the Court lift the protective order for purposes of showing the documents in this case to other unidentified "courts and regulatory authorities so that all of the records in other jurisdictions can be obtained." HH&C fails to disclose to the Court or to the Capital Suisse Defendants what other courts and regulatory authorities it has in mind. Moreover, the bank does not explain how showing these records to other regulatory authorities will help the bank obtain "records in other jurisdictions." HH&C's motion is not aimed at furthering the claims against the defendants in this case or any other case. Rather, HH&C wants to use the information to harass and intimidate business contacts and associates of the Capital Suisse Defendants and to increase the costs of litigation as part of its war of attrition against the Capital Suisse Defendants. The Court has already modified the protective order twice and has allowed HH&C to use the

[1] This Court has noted on more than one occasion that its decision to keep jurisdiction of this case was a very "close call." Therefore, the fact that the BVI court similarly determined that the proceeding against HH&C could proceed in the BVI is not surprising, nor is it a result of misleading the court as HH&C suggests.

information it has in this proceeding and in the Spanish and BVI proceedings. Here, however, HH&C has not provided this Court with any legal basis for lifting the protective order for its unknown purposes. HH&C's request should therefore be denied.

II. *HH&C Has Failed to Provide This Court With a Legal Basis for Its Request for Production of Documents in the United States.*

In a supplemental motion, HH&C requests that the Court require the Capital Suisse Defendants to produce documents in Utah. This motion should also be denied. It is well settled that in responding to discovery requests under Rule 34, all that is required is that the party make such documents available for inspection and copying. *Charles Alan Wright Arthur R. Miller*, 8A Federal Practice and Procedure § 2213 (2d ed. 1994). The operations of the Capital Suisse Defendants are located in Spain. Most of the documents responsive to HH&C's discovery requests have always been located in Spain. In fact, since the commencement of this action, the Capital Suisse Defendants have been forced to consolidate a substantial portion of their operations. As a result, and for other reasons, the remaining documents relating to the Capital Suisse Defendants are now also located in Spain. Moreover, the Capital Suisse Defendants have not and do not intend to destroy any documents, as HH&C implicitly suggests, nor is there any evidence to suggest that any documents have been destroyed. HH&C's suggestions to the contrary are simply another attempt to color the Court's opinion about the Capital Suisse Defendants in an effort to gain an improper advantage in this litigation.

Given the location of the documents, it would be improper and unduly burdensome to force the Capital Suisse Defendants to respond to the discovery requests any earlier than the deadline already imposed by the Court. For the same reasons,

require them to produce the documents in Utah would also be unjust. HH&C's motion should be rejected in its entirety.

CONCLUSION

For all of the foregoing reasons, the Capital Suisse Defendants respectfully ask the Court to deny HH&C's request to vacate the protective order as well as its motion to shorten the time for discovery.

DATED this 14th day of March, 2002.

HOLME ROBERTS & OWEN LLP

/s/ Paul T. Moxley
PAUL T. MOXLEY
MATTHEW N. EVANS
CHRISTINE T. GREENWOOD

Attorneys for the Capital Suisse Defendants

APPENDIX Q

EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(VIRGIN ISLANDS)

BVIHCV 2001/0077 [Logo]
BETWEEN:

CAPITAL SUISSE S.A.,
Claimant/Respondent,

and

HENTSCH HENCHOZ & CIE,
Defendant/Applicant.

AFFIDAVIT

I, Neil Kaplan, Attorney at law, of One Utah Center, Thirteenth Floor, 201 South Main Street,. Salt Lake City, Utah in the United States of America make oath and say as follows:

1. I am an Attorney at Law and member of the Bar of the State of Utah in the United States of America for the past 18 years and am the litigation counsel for Hentsch, Henchoz & Cie, the Applicant, in Salt Lake City, Utah, United States. I am duly authorized to make this affidavit on behalf of the Applicant in support of its application filed on December 10, 2001 herein. A copy of my biographical summary is now produced to me and marked "NAK 1".

2. The statements made herein are true and correct and unless otherwise stated within my own knowledge. The statements that are not within my knowledge I believe them to be true and correct.

3. The Applicant is a Swiss private banking limited partnership with its principal place of business situated in

Lausanne, Switzerland and has no presence in the Virgin Islands. The Respondent is a company incorporated under the laws of the Virgin Islands and has no presence in the Virgin Islands save a registered agent.

4. On August 2, 2001, the Applicant filed in state court in Salt Lake City, Utah, a Verified Complaint against Capital Suisse, S.A., (the "Respondent') which is the Claimant in this British Virgin Islands ("BVI") action and Respondent to this application and other related defendants. The other related Defendants to that action are Philippe David Gubbay who is the only person authorized to sign documents on behalf of the Respondent; Capital Suisse Inc., a Utah corporation that purports to be the administrator and registrar for the Respondent; Capital Suisse Securities Inc., a Colorado corporation that is the principal custodian of Capital Suisse S.A.; Zooley Services Limited, A Nevis, West Indies corporation that purports to be the investment advisor for the Respondent; Zooley of Utah, Inc. a Utah corporation that purports to provide financial services for Zooley Services Limited; Fernland Limited, a Nevis corporation which purports to act as director of the Respondent; and Douglas P. Hoyt, a Utah resident who holds himself out as a director and officer of Capital Suisse, Inc. A true and correct copy of the Verified Complaint is now produced to me and marked "NAK 2".

5. The Verified Complaint shows inter alia that the Respondent and the other defendants defrauded the Applicant of nearly $25 million of its monies by creating the illusion that they own, operate, administer, manage and control a legitimate and highly profitable "mutual fund" for the professional investor, i.e., Capital Suisse S.A., when in fact, they do not. The complaint further shows that the so-called "mutual fund" was merely a ruse to defraud the Applicant and others and that the

Respondent never invested the Applicant's money in legitimate investment opportunities but instead converted its funds for the Respondent's own benefit and transferred them to the Respondent's bank accounts in Salt Lake City, Utah and subsequently, to other locations.

6. The Verified Complaint states a claim for relief for fraud (among other things) and seeks a variety of remedies including rescission of the Subscription Agreements and restitution of the assets that the Applicant transferred to the Respondent. If the Utah court rules for the Applicant on its fraud claim and orders restitution, then the Subscription Agreement and related documents, inclusive of the clause under which the redemption fee is claimed in this action, would be unenforceable as between the Applicant and the Respondent.

7 On August 15, 2001, the Respondent and certain other defendants moved the Courts in Utah to dismiss the Verified Complaint on the grounds of (1) improper venue, (2) forum non conveniens, (3) international comity, and (4) lack of personal jurisdiction over certain the individual defendants including the Respondent. The Respondent argued, inter alia that the Utah court should dismiss the action in Utah and that the BVI was the preferred jurisdiction on the ground that the Subscription Agreements and related documents contained a forum selection clause choosing the BVI as the forum for the litigation of certain disputes and that based upon considerations of convenience and efficiency, the Applicant's case was not sufficiently connected to Utah to support the Utah court's continued exercise of jurisdiction.

8. Also on August 15, 2001, the Respondent filed this action in the BVI.

9. On August 29, 2001, the Applicant filed an Opposition to the Respondent's motion to dismiss. The Applicant argued that because the Subscription Agreements between it and the Respondent were merely a tool of the latter's fraud, the Utah court should not dismiss in favor of the BVI based on the forum selection clause contained therein. With regard to the Respondent's forum non conveniens argument, the Applicant argued that the Utah forum was convenient, efficient and proper because (1) Capital Suisse S.A. had consented to service and jurisdiction in Utah, (2) three of the other named defendants were located in Utah, (3) the Applicant's money was laundered through Defendants' Utah bank accounts and some still remains in Utah, (4) key witnesses, including Petsmarketing Inc. (which is referred to in the Statement of Claim filed by the Respondent in the BVI proceedings) have offices in Utah, (5) the sale of the Capital Suisse S.A. shares at issue occurred through the acts of the Utah Defendants, and (6) important documents in relation to the issues to be decided in the courts concerning the fraud are likely located in Utah.

10. The Applicant also argued that the Respondent should not be permitted to contest the jurisdiction of the courts of Utah. I am advised by Luis Juega, Spanish counsel for the Applicant and verily believe that counsel for the Respondent had submitted in proceedings before a Spanish court that the dispute between the Applicant and the Respondent was centered in Utah.

11. On September 4, 2001, the Respondent filed a Reply in support of its motion. The reply informed the Utah Court that the Respondent had filed this action in the BVI. On September 5, 2001, the Utah court (Nehring. J.) heard argument on the Motion.

12. On October 11, 2001, the Utah court denied the Respondent's motion. A true and correct copy of the Utah court's October 11, 2001 Minute Entry is now produced to me and marked "NAK 3". The court held that it would exercise jurisdiction over the Applicant's claims and proceed with adjudication on the merits, stating: *"Claimant's Verified Complaint and the record developed in connection with the defendants' Motion satisfies me that Claimant is entitled to proceed on its claim that it was fraudulently induced by Capital Suisse, S.A., to make the $25 million investment."* (*See* Minute Entry at Page 6).

13. With regard to the forum selection clause, the court held that *"I find that Claimant has alleged sufficient facts to overcome the presumption [that] the choice of forum clause in the Subscription Agreement is enforceable by making prima facie showings that the choice of forum clause is unfair and that the contract as a whole is the product of fraud."* (*Id.* at p. 4).

14. Denying the forum non conveniens argument, the Utah court found that *"much of the evidence concerning the financial affairs of Capital Suisse and its related entities, three of which are located in Utah is likely to be easily accessible in or from this forum. It is probable that part or all of the $25 million at issue found its way to Utah at one time or another. . . . I decline to send [the Applicant] elsewhere."* (*Id.* at 7).

15. On October 31, 2001, the Respondent and other defendants petitioned the Utah Supreme Court for leave to appeal the Order contained in the Minute Entry. The Utah Supreme Court has not yet ruled on their Petition. The Respondent and other defendants also moved the Utah trial court to stay the merits of the Applicant's action in Utah pending the decision from the Utah Supreme Court on whether to hear their appeal. On

November 15, 2001, the trial court denied that motion and ruled that it would proceed with adjudication of the merits. A copy of this order is now produced to me and marked "NAK 4". The Respondent has also applied to the Utah Supreme Court for a stay of all matters in the trial court pending appeal. The Supreme court has not yet ruled on the Respondent's motion.

16. The Utah trial court has therefore accepted the Applicant's arguments mentioned above. Utah is the appropriate forum for the trial of civil issues between the Applicant and the Respondent and other parties to that proceeding. Furthermore all issues relevant to the claim in the BVI and all the parties that were involved in the transactions between the Applicant and the Respondent that gave rise to the claims made in the BVI are already before the courts of Utah.

17. The Respondent and the other defendants in the Utah proceedings have not yet filed their Answer in the Utah action, which is now overdue. When the Respondent does file its answer, it will have the right to assert counterclaims against the Applicant, including the relief claimed in the proceedings in the BVI. Further, certain counterclaims are deemed "compulsory" and must be asserted by the Respondent in its answer or such claims will be waived. The claims that the Respondent has asserted in its action in the BVI will all be deemed compulsory counterclaims that it must assert or lose. The Utah Rules of Civil Procedure P 13 explain:

> *Compulsory Counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence*

of third parties of whom the court cannot acquire jurisdiction.

The relevant extract from those rules is now produced to me and marked " NAK 5".

18. The Respondent's claims in the BVI and the Applicant's claims in Utah both arise out of the same transaction or occurrence, *i.e.*, the Respondent's fraud against the Applicant through the medium of the subscription agreement and otherwise and failure properly to return its assets. Consequently, the Respondent must assert in its answer in Utah the claims it now asserts in the Virgin Islands or those claims will be lost.

19. If the Respondent were to assert as a counterclaim the same claim it has made in the BVI, the Utah court will have jurisdiction to resolve it. If, under Utah choice of law principles, the resolution of the counterclaim requires the application of the law of the BVI, the Utah court may apply that law. If the counterclaim is resolved in favor of the Respondent, the Utah court may award the relief that the Respondent seeks in the BVI (*i.e.*, a declaration that Capital Suisse S.A. has complied with the International Business Companies Act, Cap. 291, a declaration that the Applicant is in breach of the Articles of Association and the Prospectus by not accepting a payment *in specie* for the redemption of its shares in the Capital Suisse S.A., a declaration that the Applicant is no longer a shareholder of Capital Suisse S.A., a redemption fee of $963,919.74, damages and such further relief as the court deems just). The Applicant would, however, assert defenses against the counterclaim and any relief requested thereupon.

20. Now that the Utah court has accepted jurisdiction over the Applicant's, complaint, the Utah court has ordered that the parties shall be permitted to take discovery. If

the Defendants do not engage in dilatory tactics, discovery could be completed within the next six months. We would urge the Utah court to schedule the trial within one year.

21. At the trial of the action in Utah the parties will be entitled to introduce oral and documentary evidence, including evidence of the laws of the BVI, if appropriate, in support of their claims. Under the laws of Utah, Mr. Gubbay and any other persons have the right to be present in court at that hearing and give relevant evidence in court at the hearing on behalf of the Respondent and other Defendants. We are yet to identify any witnesses who resides in the BVI and who are expected to have relevant evidence in this matter. The procedural rules of Utah will allow the parties to introduce in evidence certified copies of public documents emanating from the Virgin Islands. I have been advised by Daniel Morales, a member of the Swiss bar, and verily believe that the enforcement of final judgment made in Utah in favor of the Respondent for compensatory damages will be enforceable against the Applicant in Switzerland under Swiss rules that would be equally applicable to such a final judgment from the court in the BVI.

22. In the circumstances the proceedings in the BVI are unnecessarily duplicative of those in Utah and would cause the litigants to incur significant additional expense without conferring any additional benefit to the parties that is not available in the proceedings in Utah. If the Utah court were to make a finding that the subscription agreement and related documents are unenforceable there would also be a waste of the resources that the courts in the BVI have allocated to these proceedings.

23. I therefore humbly request that this Honorable Court do discharge the order made granting leave to serve the

claim form, statement of claim and other proceedings in this matter on the Applicant and set aside the service of the claim form, statement of claim and other proceedings and strike out the Respondent's claim in the Virgin Islands.

SWORN at _____

On the 10th day of December, 2000

Before me:

_____

Notary public

/s/ Neil Kaplan
NEIL KAPLAN

APPENDIX R

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IN THE DISTRICT COURT FOR THE THIRD JUDICIAL DISTRICT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

Consolidated Case No. 010905355
Judge Anthony Quinn

HENTSCH HENCHOZ & CIE.

Plaintiff;

vs.

PHILIPPE DAVID GUBBAY, CAPITAL SUISSE, S.A., CAPITAL SUISSE SECURITIES, INC., CAPITAL SUISSE, INC., ZOOLEY SERVICES LIMITED, ZOOLEY OF UTAH, INC., FERNLAND LIMITED, DOUGLAS P. HOYT, and JOHN DOES 1-10,

Defendants.

MEMORANDUM SEEKING DECLARATION REGARDING OUTSTANDING ORDERS AND SATISFACTION OF BOND

Defendants Philip D. Gubbay, Capital Suisse, S.A. (the "Fund"), Zooley Services Limited ("Zooley"), Capital Suisse, Inc., Zooley of Utah, Inc., and Ferland Limited ("Fernland") (all collectively "Capital Suisse") through their appellate counsel respectfully submit this Memorandum in Support of Expedited Motion Seeking Declaration Regarding Outstanding Orders and Waiver of Bond.

INTRODUCTION

On August 15, 2002, Capital Suisse appealed the July 17, 2002 Order of this Court granting Hentsch Henchoz & Cie's ("HH&C") Motion for Summary Judgment and Motion to Dismiss. The basis of the appeal is that the Court erroneously failed to enforce a forum selection clause found in the agreements at issue in this case. On August 6, 2004, the Utah Supreme Court issued an opinion[1] staying the appeal in order to allow Capital Suisse time to comply with two conditions: First, the Supreme Court required Capital Suisse, within thirty days of the its order, to bring itself into compliance with this Court's outstanding orders. Second, the Supreme Court required Capital Suisse to post a bond in the amount of any unsatisfied portion of the judgment that has been entered against it.

The Supreme Court remanded the case to this Court to make the following determinations:

> (1) whether Capital Suisse has adequately complied with the orders of the district court within thirty days from the issuance of this decision; (2) the amount of the unsatisfied portion of the district court judgment; and (3) whether Capital Suisse has posted an adequate bond in that amount.

Opinion at ¶ 25.

Capital Suisse brings the present Motion seeking a declaration from the Court that it has complied, with all outstanding orders of this Court and has satisfied the requirement that Capital Suisse post a bond. In regards to the issue of whether Capital Suisse has adequately complied with this Court's orders, while Capital Suisse's current counsel was not Capital Suisse's trial counsel, counsel for Capital

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[1] *See Hentsch Henchoz & CIE v. Gubbay*, ___ P.3d ___, 2004 WL 1753372 (Utah 2004) (herein after referred to as the "Opinion").

Suisse understands that the only outstanding order from the Court that Capital Suisse has failed to comply with is the Court's March 25, 2002 Order requiring Capital Suisse to return to Utah all documents produced in the ordinary course of business in Utah that were removed by Capital Suisse during the course of this litigation. Capital Suisse has returned those documents to Utah and have made the documents available to HH&C for review.

Capital Suisse also seeks to have this Court find that, for the reasons set forth herein, Capital Suisse cannot post a bond and that such requirement is satisfied by adequate alternative safeguards. As established by the Affidavit of Philip D. Gubbay ("Gubbay Aff.") filed concurrently herewith, Capital Suisse lacks the financial ability to post a bond. Moreover, there exist several Precautionary Measures and Orders issued by the Spanish Marbella Court in a matter to which HH&C is a party that strictly prohibit Capital Suisse from accessing any of its remaining assets. Therefore, any attempt by Capital Suisse to use assets to post a bond would violate the Spanish Court's Orders. The Spanish Court's Orders, which freeze all of Capital Suisse's assets, adequately safeguard these assets from dissipation and thus satisfy the Supreme Court's reason for requiring the bond. Because this Court has been charged on remand to determine the "*adequacy*" of the bond required by the Supreme Court, jurisdiction is proper here and therefore Capital Suisse requests this Court find that the bond requirement is satisfied.

ARGUMENT

I. UPON THE RETURN OF THE DOCUMENTS REMOVED FROM UTAH BY CAPITAL SUISSE, THE COURT SHOULD DECLARE THAT CAPITAL SUISSE HAS SUFFICIENTLY COMPLIED WITH ALL OUTSTANDING ORDERS OF THIS COURT.

The Supreme Court has remanded the appeal of this matter to this Court to determine whether Capital Suisse has com-

plied with all outstanding orders of this Court entered prior to appeal. As noted above, Capital Suisse's current counsel was not Capital Suisse's trial counsel. Based on a review of the record in this case made in an attempt to determine what outstanding orders of this Court exist, Capital Suisse believes that the only outstanding order from the Court that Capital Suisse has failed to comply with is the Court's March 25, 2002 Order requiring Capital Suisse to return to Utah all documents produced in the ordinary course of business in Utah that were removed by Capital Suisse during the course of this litigation. Capital Suisse has returned those documents to Utah and have been made them available to HH&C for review.

If the Court finds that there are additional outstanding orders requiring Capital Suisse's further compliance, Capital Suisse requests that the Court promptly determine what those orders are so that it may comply with the Supreme Court's instructions.

II. THE BOND REQUIRED BY THE UTAH SUPREME COURT SHOULD BE WAIVED.

As noted above, the Utah Supreme Court stated that Capital Suisse needs to post a bond in the amount determined as adequate by this Court. See Opinion at ¶ 24. While it is unclear from the Supreme Court's decision what type of bond the Court is imposing on Capital Suisse, it appears that the most closely analogous type of bond is a supersedeas bond. A supersedeas bond is defined as "[a] bond required of one who petitions to set aside a judgment or execution and from which the other party may be made whole if the action is unsuccessful." BLACK'S LAW DICTIONARY 738 (6th ed.1990). "[T]he purpose of a supersedeas bond is to protect non-appealing parties by maintaining the status quo during the appeal and insuring that those who have obtained the judgment under review will not be prejudiced by a stay of the judgment pending final determination of the appeal."

Diversified Holdings, L.C. v. Turner, 63 P.3d 686, 702 (Utah 2002).[2] Because the Supreme Court held in its decision that its requirement that Capital Suisse post a bond for any unsatisfied portion of the judgment was based on its concern that "any continued delay will lead to the further dissipation of Capital's Suisse's assets," or, in other words, to maintain the status quo, the bond required of Capital Suisse apparently is a supercedeas bond.[3]

In dealing with supersedeas bonds, courts have held that the bond may be waived if the party seeking to stay a judgment pending appeal demonstrates that it is financially impossible for it to post the bond. *See, e.g., HCB Contractors v. Rouse & Assocs.*, 168 F.R.D. 508, 512 (E.D. Pa. 1995) ("the court possesses the power to waive the requirement of a supersedeas bond"). In *Miami International Realty v. Paynter*, 807 F.2d 871 (10th Cir. 1986), a jury found Paynter, an attorney, liable for malpractice and awarded the plaintiff $2,100,000. Paynter appealed the decision and moved for a stay of execution of the judgment and a waiver of supersedeas bond. The trial court granted Paynter motion to stay and

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[2] Utah Rule of Civil Procedure 62, which governs supersedeas bonds, states in relevant part: "When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay, unless such a stay is otherwise prohibited by law or these rules. The bond may be given at or after the time of filing the notice of appeal. The stay is effective when the supersedeas bond is approved by the court."

[3] Part of Capital Suisse's confusion as to what type of bond the Supreme Court has imposed on it is due to the fact that normally a supersedeas bond is only required when the appellant (Capital Suisse in this case) is seeking to stay enforcement of the judgment. *See Hidden Meadows Dev. Co. v. Mills*, 590 P.2d 1244, 1248 (Utah 1979) (holding that an appellant is not bound to furnish a supersedeas bond; rather, it is only necessary if the appellant wishes to restrain the judgment creditor and the lower court from taking affirmative action to enforce a judgment). Capital Suisse has not sought to stay enforcement of the judgment entered against it. *See* Gubbay Aff. at ¶ 19.

waived the supersedeas bond. The plaintiff then appealed the trial court's decision.

On appeal, the Tenth Circuit upheld the trial court's waiver of the supersedeas bond. In its decision, the Tenth Circuit noted that trial courts "have inherent discretionary authority in setting supersedeas bonds." *Id.* at 873. It then quoted the following from the Second Circuit's decision in *Texaco, Inc. v. Pennzoil Co.*, 784 F.2d 1133, 1154 (1986):

> A judgment creditor's primary concern when a judgment in his favor is stayed pending appeal is that he be "secure . . . from loss resulting from the stay of execution. . . ." In making that determination we look to general equitable principles. Accordingly, when setting supersedeas bonds courts seek to protect judgment creditors as fully as possible without irreparably injuring judgment debtors. . . . A full supersedeas bond may be required "where there is some reasonable likelihood of the judgment debtor's inability or unwillingness to satisfy the judgment in full upon ultimate disposition of the case and where posting adequate security is practicable", whereas no bond or a reduced bond would suffice when the creditor's interest, due to unusual circumstances, would not be unduly endangered. . . .

Id., citing *Wunschel & Small, Inc., v. United States*, 554 F.Supp. 444-45 (U.S.C1.Ct.1983) (Rule 62(d) does not preclude the court from issuing a stay without a bond or upon the posting of a partial bond); *C. Albert Sauter Co. v. Richard S. Sauter Co.*, 368 F.Supp. 501, 520-21 (E.D.Pa.1973) (stay of execution granted following defendants' showing of lack of sufficient assets to satisfy the judgment or to obtain a bond in amount thereof and that execution of the judgment would place each of the defendants in insolvency).

The Tenth Circuit, having concluded that a stay of judgment could be obtained under Rule 62(d) without obtaining a

supersedeas bond where the party appealing judgment has demonstrated that posting the bond is financially impossible, held that the trial court did not err in granting Paynter's request for stay without a supersedeas bond. The court found that Paynter's motion for a stay was supported by his affidavit in which he stated that he did not have sufficient assets to post a supersedeas bond for the amount of the judgment. *See also HCB Contractors*, 168 F.R.D. at 512 (waiving requirement of supersedeas bond upon finding party lacking assets to post bond).

Here, as Mr. Gubbay's Affidavit clearly establishes, Capital Suisse is unable to post a bond for either of two independent reasons. First, Capital Suisse lacks sufficient assets to post the bond required by the Supreme Court. *See* Gubbay Aff. at ¶¶ 16, 18. In fact, several of the entities the make up Capital Suisse, including Mr. Gubbay, are each bankrupt. *See id.* at ¶¶ 12, 15. As a result, all attempts by Capital Suisse to obtain a bond have been denied. *See id.* at ¶ 16. The Court should therefore waive the bond because Capital Suisse does not have the ability to post one.

Second, even if Capital Suisse possessed sufficient assets to post the bond, the Spanish Marbella Court has entered several Precautionary Measures and Orders that freeze all of Capital Suisse's assets. The Precautionary Measures, dated July 25, 2000, May 15, 2001, and May 17, 2001, require the "freezing and preventive seizure of the balances of the bank accounts, deposits of securities, bonds, shares, public debt, contents of security boxes, or other financial assets" of Capital Suisse in all jurisdictions where Capital Suisse has assets, including Spain, Gibraltar, Amsterdam, New York and Salt Lake City. *See* Gubbay Aff. at ¶¶ 5, 6, 7 and Exhibits 1 & 2 thereto. The Spanish Marbella Court reaffirmed these Precautionary Measures in its orders dated March 6, 2002 and March 12, 2002. *See id.* at ¶¶ 8, 9. These Precautionary Measures and Orders remain in effect at the present time. *See*

id. at ¶¶ 5, 10. Because the Precautionary Measures and Orders entered by the Spanish-Marbella Court prohibit the disposal (in any form) of any of the assets of Capital Suisse, any attempt by Capital Suisse to post the bond required by the Utah Supreme Court would violate the Precautionary Measures and Orders. *See id.* at ¶ 14. For this second, independent reason, it is not possible for Capital Suisse to comply with the Supreme Court's Opinion regarding the posting of a bond.

Utah Rule of Civil Procedure 62(i)(2) provides "Upon motion and good cause shown, the court may permit a deposit of money in court or other security to be given in lieu of giving a supersedeas bond under Subdivision (d)." The Utah Court of Appeals held in *D'Aston v. D'Aston*, 790 P.2d 590 (1990), a decision relied upon heavily by the Supreme Court in its Opinion in this case, that a party seeking a stay "merely has the obligation to come forward and offer a reasonable alternative to the trial court to safeguard [its] assets from dissipation pending her appeal." *Id.* at 594. The Precautionary Measures and Order by the Spanish Marbella Court, which freeze all of Capital Suisse's assets, provide an alternative safeguard of Capital Suisse's assets from dissipation. *See Paynter*, 807 F.2d at 874 (finding trial court's order enjoining the transfer or disposing of any assets a sufficient alternative safeguard to supersedeas bond); *see also HCB Contractors*, 168 F.R.D. at 514 (holding an order restraining the transferring of judgment debtors assets sufficient alternative security to waive supersedeas bond).

The clear desired intent of the Supreme Court's requirement that Capital Suisse post a bond is to protect HH&C from any further dissipation of Capital Suisse's assets. Because Capital Suisse has very few assets, and because even what assets it has are frozen pursuant to the Spanish Court's Orders, there is no threat that Capital Suisse's assets will be dissipated pending the appeal of this matter. The Supreme Court's bond requirement is therefore unnecessary as it will provide no additional protection to HH&C in this regard.

At the time the Opinion in this case was entered, the Supreme Court had no facts before it that would allow it to know it would be impossible for Capital Suisse to post the required bond. In *In the Matter of the Discipline of Jamis M. Johnson*, 48 P.3d 881 (Utah 2002), Justice Durham argued "Where the judgment is equivalent to a professional death penalty, I believe that this court's review should precede execution." *Id.* at 887 (Durham, J., concurring and dissenting). Absent a finding by this Court that the intent of the Supreme Court's opinion has been satisfied in light of the Spanish Court's Orders, or, at a minimum waiving the requirement that Capital Suisse post a bond that it clearly cannot provide, Capital Suisse is denied due process and would, in effect, be condemned to the equivalent of the "death penalty" as any opportunity for it to have its appeal heard on the merits would be lost. The Court therefore should hold the bond required by the Supreme Court is satisfied.

CONCLUSION

For the reasons set forth above, the Court should find that the remaining outstanding order which Capital Suisse must comply with is this Court's Order requiring Capital Suisse to return all documents it removed from Utah during the course of this litigation and that Capital Suisse has complied with that Order. The Court should also hold that the bond required by the Supreme Court in its Opinion has been satisfied.

DATED this 3rd day of September, 2004.

HATCH, JAMES & DODGE

By: /s/ Brent O. Hatch
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